

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

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HODELL-NATCO INDUSTRIES, INC,	)	
	)	
Plaintiff,	)	Case No. 1:08CV2755
	)	
vs.	)	
	)	
SAP AMERICA, INC.,	)	
	)	
Defendant.	)	

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TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE HONORABLE  
SENIOR JUDGE LESLEY WELLS, JUDGE OF SAID COURT,  
ON WEDNESDAY, FEBRUARY 18TH, 2015  
COMMENCING AT 10:30 O'CLOCK A.M.

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Court Reporter:	GEORGE J. STAUDUHAR
	801 W. SUPERIOR AVE.,
	SUITE 7-184
	CLEVELAND, OHIO 44113
	(216) 357-7128

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**APPEARANCES:**

On behalf of the Plaintiff:

BROUSE McDOWELL - Akron  
BY: P. WESLEY LAMBERT, ESQ.  
388 South Main Street, Suite 500  
Akron, OH 44311

and

BROUSE McDOWELL - Cleveland  
BY: SHARON A. LAURDE, ESQ.  
CHRISTOPHER J. CARNEY, ESQ.  
600 Superior Avenue, E, Suite 600  
Cleveland, OH 44114

On behalf of the Defendant:

DRINKER BIDDLE & REATH - Philadelphia  
BY: GREGORY J. STAR, ESQ.  
MICHAEL J. MILLER, ESQ.  
ALEX H. HAYDEN, ESQ.  
One Logan Square  
18th & Cherry Streets  
Philadelphia, PA 19103

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P R O C E E D I N G S

THE COURT: We have been communicating back and forth, but at this point, we are trying to see whether there is any resolution of this case that might be possible, that would prevent everyone from taking it all the way through trial, although we are ready to go to trial.

As you know, we have been through lots of things presented by the parties, and so the case is a familiar one now. This is a courtroom where we would try it, and we have a request for the top half of Ohio to draw upon for our jurors. What I found over the many years, both as a Common Pleas Court and as a Federal Judge here, we have jurors who come, but they are leaving behind very important things.

They will stay here and be accommodated here throughout the trial, but still I am always conscious of the fact that they are performing their duties but doing it at some cost that never can really be measured. But we get great juries out of the top half, and they come from the whole top half. And so it is an interesting way to go forward.

I want to go over some things now, which I think will be helpful to us, and I have some questions to ask. And we are always looking to see whether or not it

1 is possible for people to work out some, if not all, of  
2 the issues in the case so that not everything has to go  
3 through trial. So that's what we are here to do.

4 And you are familiar with my clerk, so I  
5 think we will just go over some things now to prepare for  
6 the trial. In terms of the length of the trial, I am  
7 really not at all clear about how long this trial might  
8 go, and so I am looking to see whether or not you have  
9 got some idea how long.

10 We have given you a big space, but we don't  
11 know how you are looking at the case and how much time  
12 you think it would take.

13 So can you give me some information about  
14 that?

15 MS. LAURDE: Yes, your Honor. I am  
16 Sharon Laurde. We have in our case in chief fifteen  
17 witnesses.

18 THE COURT: Okay.

19 MS. LAURDE: I anticipate that we will be  
20 able to get in on average two per day. So we are looking  
21 at, at least, two weeks in our case in chief. I don't  
22 know about opposing counsel, but we are looking at about  
23 two weeks.

24 THE COURT: And they can speak for  
25 themselves.

1 MR. STAR: Good morning, your Honor.

2 Greg Star.

3 THE COURT: Yes.

4 MR. STAR: Well, I think when we were back  
5 here in October of last year we had discussed that this  
6 was maybe a two-week trial, probably less than that. I  
7 am not sure of the fifteen witnesses. That number is  
8 bigger than I understand, so I am not quite sure, and  
9 maybe we can go through that.

10 THE COURT: That's something to find out  
11 now.

12 MR. STAR: And we had discussed yesterday  
13 this would come up, based on the witnesses we thought,  
14 that all of the testimony from both sides would probably  
15 come in a little over one week and wouldn't necessarily  
16 be a two-week trial.

17 THE COURT: Okay. We need final witness  
18 lists. We don't have that. Have you got them today?  
19 You should.

20 MR. STAR: Sorry to interrupt.

21 THE COURT: Sure.

22 MR. STAR: We did put in per your pretrial  
23 order late spring-early summer last year, we did submit  
24 witness lists and did objections to those. So we do know  
25 who the witnesses are.

1 THE COURT: Right. And we have seen that,  
2 but I am looking for the final one. I want to really  
3 know now who you need.

4 MR. STAR: Your Honor, we did file our final  
5 witness list back in October.

6 Is that correct?

7 MS. LAURDE: It has not changed since that  
8 time. I can identify the names.

9 THE COURT: If you already sent it to us, we  
10 don't need to see it again, right?

11 MR. LAMBERT: I think, your Honor, there are  
12 a couple on our witness list that we would more than  
13 likely not call.

14 THE COURT: Uh-huh.

15 MS. LAURDE: So it would be smaller than the  
16 one we filed.

17 THE COURT: Okay. Then give us a correct  
18 witness list.

19 Can you do that today?

20 MR. LAMBERT: Yes. And I think we are close  
21 to having the order worked out.

22 THE COURT: Okay.

23 MR. LAMBERT: Logistically speaking,  
24 depending on how long things go, but I think it can be  
25 filed in the order to be presented.

1 THE COURT: Okay.

2 MR. STAR: Your Honor, I think if we can  
3 just pause, if Ms. Laurde actually has the names of  
4 the fifteen right now, it would help us to know who they  
5 are.

6 THE COURT: Yeah.

7 MS. LAURDE: Absolutely.

8 THE COURT: Okay.

9 MS. LAURDE: We will be calling Kevin Reidl,  
10 Mr. Lowery, Mr. VanLeuwen would appear by videotape, our  
11 expert, Mr. Grumble, Mr. Meland. We do have a question  
12 about Mr. Ashley, but he would certainly be a witness,  
13 Mr. DeVoe —

14 THE COURT: So you have a question, but  
15 he would be a witness. We want to know who the witness  
16 is.

17 MS. LAURDE: Mr. Ashley, there is an issue  
18 with regard to Mr. Ashley that we would need to raise  
19 with you, your Honor. Up until last week, we had been  
20 advised that Mr. Ashley would appear live. SAP's counsel  
21 told us he would appear live up until last week.

22 THE COURT: Okay.

23 MS. LAURDE: At this point, your Honor, we  
24 had prepared designations with regard to his testimony  
25 and received counter designations, but because he was

1 going to appear live, no objections were prepared by  
2 either side.

3 So at this point, the Court would need to  
4 rule on the objections that would be proffered, but we do  
5 have an alternative to that, which I think might be a  
6 better option, and that is, under Rules 43 and 45,  
7 we could actually subpoena Mr. Ashley to appear in  
8 the District Court in which he resides and take his  
9 testimony live via video feed, and that would save the  
10 Court ruling on objections. He would be presented live,  
11 and I think that would be a more acceptable option to  
12 both parties.

13 THE COURT: That's something you should  
14 discuss right now and see what their response is.

15 MR. STAR: Thank you, your Honor. The issue  
16 with Mr. Ashley, if you go back to our submission, back  
17 in October of our trial list, we had indicated and has  
18 been known all along Mr. Ashley has been a former SAP  
19 employee living in New Hampshire, and we had said that we  
20 would anticipate him to come, and he had been willing to.

21 Up until just the last couple of weeks,  
22 where he informed us that he wanted what we thought was  
23 too much money to actually come, he told us he wanted  
24 \$2,400 a day, \$300 an hour, a minimum of \$2,400 a day  
25 to come — and we communicated that to the other side —

1 we are not willing to do that for lots of reasons.

2 As far as having a witness like that appear  
3 by video conference, we can certainly discuss it.

4 Mr. Lambert and I had discussions about that topic with  
5 other witnesses, and we didn't think that actually works,  
6 and I had the understanding — maybe I am wrong — that  
7 the technology in this particular building didn't allow  
8 for it anyway.

9 MS. LAURDE: As far as the technology is  
10 concerned, it is easy in this time period to come up with  
11 the technology in order to accommodate that. We have  
12 reached out to a vendor to ensure that they could bring  
13 in the equipment needed here and ensure the District  
14 Court he would have the technology in order to transmit  
15 the witness.

16 And frankly, having a live witness is much  
17 more compelling than having a witness read from a  
18 deposition transcript or just showing video clips.  
19 Mr. Ashley is, in fact, a pretty critical witness for  
20 us.

21 There are a couple of e-mails that  
22 Mr. Ashley had written with his employment after SAP  
23 where he made statements such as "you know, this was a  
24 case where we had a product not ready for prime time, a  
25 partner relying on documentation that SAP put together,

1 we were relying on those commitments, and SAP, frankly,  
2 messed up."

3 So Ashley is important as far as proving  
4 material facts in our case, and having him live would  
5 serve the interest of justice more than just reading  
6 deposition transcripts.

7 MR. STAR: So again, Mr. Ashley lives in  
8 New Hampshire. It was known at the time, and his  
9 deposition was videoed. We have the video. The quality  
10 is pretty good, so like other witnesses, designations and  
11 portions of his videotape could be played.

12 Ms. Laurde wrote e-mails — Mr. Ashley wrote  
13 e-mails, and indeed, he wrote them, but those e-mails  
14 were written, and he was questioned about those e-mails  
15 at his deposition, and counsel had them. So our view of  
16 this, your Honor, we don't think it is necessary or  
17 appropriate to try to — and I don't know if Mr. Ashley  
18 — I would have to look at the rule — I don't know if he  
19 could be compelled to suggest to appear at a different  
20 courthouse and not in this courtroom.

21 THE COURT: Actually, we do that frequently.

22 MR. STAR: But here I don't think it is  
23 necessary because he was deposed on all those issues, and  
24 there is a videotape, and like other witnesses who appear  
25 here and available, we can just have his designations

1 come in. And Ms. Laurde is right, we would need to get  
2 those designations in front of your Honor and have those  
3 ruled on.

4 MS. LAURDE: Your Honor, I certainly  
5 understand SAP's not wanting him here live. I think  
6 Mr. Ashley is going to be a tremendous witness for us. I  
7 think that he will be able to present himself much more  
8 fully to the jury via video. This happens frequently,  
9 and the rules allow for it. I think it would give the  
10 jury a better appreciation for Mr. Ashley and his  
11 credibility and his testimony. He is a very important  
12 witness for us.

13 And frankly, up until last week, SAP told us  
14 he was going to be here. I mean, we had one week notice  
15 that he wasn't going to appear, and we can arrange for  
16 him to appear. And SAP, frankly, you know, Mr. Star is  
17 saying he is not necessary, but he is necessary, and we  
18 can arrange for him to appear through Veritex or some  
19 other vendor.

20 So the best option is to have him appear at  
21 the District Court in which he resides, and Mr. Star can  
22 cross-examine him on his exhibits.

23 MR. STAR: So the last thing I would say,  
24 your Honor, I obviously haven't said that Mr. Ashley is  
25 not perhaps a necessary witness; all I said, it is not

1 necessary to do a live video link of this man because we  
2 do have a very, a thorough video recorded deposition of  
3 him that can easily be ruled on and brought in.

4 The parties have already done the  
5 designations and exchanged those with each other as I  
6 recall going back to last year. We just hadn't bothered  
7 to lodge objections because we had believed that he was  
8 willing to come, but now he told us he wants the  
9 ridiculous amount of money just to appear as a fact  
10 witness, and even having him appear by this video link as  
11 he communicated to me, he would still want all this  
12 money.

13 And then the question is: Who is going to  
14 pay that?

15 So I think the short answer is, we ought to  
16 get his deposition designations in front of your Honor,  
17 get them ruled upon, and that's what his testimony ought  
18 to be.

19 MS. LAURDE: Your Honor, I can only  
20 reiterate that Mr. Ashley is an important witness for us,  
21 and if we are willing to bear the cost of the video  
22 transmission, I don't understand Mr. Star's concern.

23 Why does it matter to him if he  
24 cross-examines him live versus have the deposition read  
25 in? I mean, the reality is, we are entitled to have this

1 witness here live. We were told he would be live up  
2 until a week ago. If we bear the cost of ensuring the  
3 video transmission works, Mr. Star can cross-examine him  
4 all he wants.

5 THE COURT: Isn't that so?

6 MR. STAR: Certainly, I could cross-examine  
7 him if he is through the video conferencing.

8 THE COURT: Right.

9 MR. STAR: The big issue with Mr. Ashley —  
10 first off, I want the record to be clear we never made  
11 any promise about the man. It was always known he was a  
12 former employee and had no control on him. It was only  
13 recently he sprung on us he wants all this money, and we  
14 communicated that.

15 Yes, we can cross-examine by video. I just  
16 think that isn't necessary because all they want to ask  
17 him has been asked, and he has given the answers he  
18 wants.

19 THE COURT: Well, I think you have the right  
20 to have him go forward.

21 MS. LAURDE: Thank you, your Honor.

22 THE COURT: Okay. So what else have we gone  
23 through?

24 MR. MILLER: We were going through witness  
25 list.

1 THE COURT: We have to have a final witness  
2 list because we have lots of witnesses written down, and  
3 we need to know.

4 What's next?

5 MS. LAURDE: Next is Mr. DeBoe, Mr. Krause,  
6 Mr. Killingsworth, we have videotape depositions of  
7 Andy Ziv and Mr. Woodrun. We also have Mr. Vislocky,  
8 Mr. Clarke, Otto Reidl, and then we have our expert,  
9 Mr. Kennedy, who we would need to proffer his testimony  
10 for your Honor to ensure that we have that available to  
11 us, if necessary, on appeal.

12 THE COURT: Okay.

13 MS. LAURDE: I believe, your Honor, the one  
14 issue with regard to some of these witnesses, four of the  
15 witnesses, that we would like to call in our case in  
16 chief are either current or former employees of SAP, and  
17 certainly, I am assuming that they will be testifying in  
18 SAP's case in chief as well, and I simply don't know how  
19 you would like to handle that. We would be calling them  
20 and having our examination.

21 I don't know if you want to have the  
22 witness complete in one day or if we would call them and  
23 then SAP would then recall them later in their case in  
24 chief.

25 THE COURT: A little bit depends on where

1 they are. I mean, if they are local around here, it  
2 isn't — you know, if they aren't, okay. So then I think  
3 we need to do them.

4 MS. LAURDE: In one day.

5 THE COURT: One day, that, yeah.

6 MR. STAR: And if I may, so we have it  
7 clear, it is Mehnert-Meland. He is a former employee.  
8 He is in North Dakota or South Dakota, and the other  
9 employee is a former employee, Dan Krause, and we are  
10 planning to bring them as part of our case, and this is  
11 an issue that came up in October about witnesses coming  
12 from out of town, how that would go, recognizing, of  
13 course, the Plaintiff has the ability to call our  
14 witnesses as part of their case.

15 For the orderly presentation of evidence, we  
16 do think the jury is best served by hearing from these  
17 witnesses in the order it should happen in our case that  
18 the Plaintiff would have an opportunity to cross-examine  
19 these witnesses on a variety of topics.

20 MR. MILLER: Your Honor, Mike Miller.

21 And we have been here multiple times, and in  
22 an attempt to avoid some confusion, we should be  
23 considering these witnesses in two different categories.  
24 There are the current SAP employees and the former SAP  
25 employees. Dan Krause and Ralph Mehnert are former SAP

1 employees, so we would not imagine that they would be  
2 part of the Plaintiff's case in chief unless they were  
3 able to subpoena them, which I am not aware that they are  
4 going to.

5 We will likely call them in our case and  
6 will bring them in from wherever they are, North Dakota  
7 or wherever it is, and the Plaintiff will be permitted to  
8 cross-examine them. So I didn't want there to be  
9 confusion. Those are former employees. They have been  
10 deposed, and they are going to testify live, and they  
11 will be witnesses of ours.

12 Then there are the current employees, and I  
13 think they are Ed DeBoe, Paul Killingsworth.

14 MR. STAR: Just those two.

15 MR. MILLER: Okay. Then, there are only two  
16 employees, Ed DeBoe and Paul Killingsworth, and if  
17 Plaintiff is going to call them in their case in chief,  
18 if that's going to happen, then it will happen, and we  
19 would reserve the right to either conduct our cross as  
20 part of the Plaintiff's case in chief to avoid multiple  
21 trips —

22 THE COURT: That's a good way to do it.

23 MR. MILLER: It can be efficient and may  
24 be confusing, and we will have to decide at that time,  
25 depending on their schedules and availability, also.

1 MS. LAURDE: Your Honor, we have always  
2 discussed with SAP's counsel that we would, in fact, be  
3 calling both the former and current employees that were  
4 identified in our case in chief. It is a bit of a  
5 surprise now they are saying they were not aware we were  
6 planning to call them in our case in chief.

7 We were advised they would be available, and  
8 frankly, this is not what we had discussed with counsel.  
9 But we are entitled to put on our case in chief as we see  
10 fit.

11 THE COURT: That's true.

12 MS. LAURDE: And so we want  
13 Mr. Mehnert-Meland and Mr. Krause available to us. If  
14 SAP is saying they will not be here for the time period  
15 during our case in chief, then I would suggest we arrange  
16 to have them available live during our case in chief  
17 because we want our case to go in in an orderly fashion  
18 and the testimony of e-mail traffic they have is very  
19 critical in our case against SAP.

20 So I would suggest that we treat the former  
21 employees who are voluntarily coming, that we treat the  
22 current employees who will be available, we put on our  
23 case and SAP put on their case and do the cross. I don't  
24 see any reason why we shouldn't have access to them  
25 during our case in chief when that's always what we

1 discussed.

2 MR. LAMBERT: Your Honor, if I may add, if  
3 you recall the process for submitting the deposition  
4 designations was such that neither side submitted  
5 deposition designations for our case in chief.

6 Based on representations of opposing  
7 counsel, we did not submit designations for Mr. Krause or  
8 Mr. Mehnert, and we were told they would be available,  
9 that they would be live witnesses and wouldn't need to be  
10 presented by deposition.

11 MR. STAR: So let me just set the record  
12 straight again on a couple issues.

13 THE COURT: I don't know about setting the  
14 record straight. This is unusual to have so much  
15 difference in memory.

16 MR. STAR: It has been said there were  
17 discussions that we would have these particular witnesses  
18 here for Plaintiff's case in chief. Those discussions  
19 have never actually happened. That's not true. When we  
20 were back here in October, I raised the issue that we had  
21 these witnesses who were out of the jurisdiction and  
22 would need to travel.

23 THE COURT: Right.

24 MR. STAR: And your Honor said the parties  
25 should discuss that. There has never been a discussion.

1 The only thing we had was a short e-mail exchange last  
2 week where Mr. Lambert told me he would give a list of  
3 witnesses during his case and never got that back. So  
4 for these former witnesses, it is a big inconvenience  
5 for them. They have been good enough to be willing to  
6 come.

7 THE COURT: Okay. Before you go into that  
8 part of what you want to tell me about, I am really  
9 surprised that we are sitting here today on the edge of a  
10 trial, and this is where you guys are with witnesses. I  
11 mean, it doesn't — it is very unusual and kind of  
12 baffling to me.

13 This case doesn't involve a whole lot of  
14 witnesses, but most of the people involved in the case  
15 who the jury needs to hear from are people who each of  
16 you has a reason to want to be able to have in front of  
17 the jury with you asking the questions and you deciding  
18 what should be said. So you have got to pull this  
19 together yourselves, and we will just wait until you do  
20 it. This is really unusual, your having difficulty with  
21 this.

22 MR. LAMBERT: Your Honor, the entire reason  
23 — and I will go back and check the transcript of the  
24 final pretrial we had in October — but I think when I  
25 read it, we will find this was covered in pretrial, and

1 we were told the witnesses would be available in our  
2 case. I could be wrong and haven't read it for a while.  
3 Obviously, we would like to have Mr. Mehnert and Krause's  
4 testimony presented in our case in chief.

5 THE COURT: Is this the first time you have  
6 ever heard this? You never knew they wanted them  
7 available?

8 MR. STAR: They never specifically said to  
9 us "we need to the have you bring these gentlemen here  
10 available for our case." They have them on the witness  
11 list but never came to have us to arrange to have these  
12 gentlemen. It has been known all along where these  
13 individuals live and did the depositions scattered all  
14 around the country. No one has broached this. That's  
15 why I broached it back in October.

16 MR. MILLER: And that's why you raised it  
17 last week and never heard —

18 THE COURT: So it has to be resolved today.

19 MR. LAMBERT: I think the fair and just way  
20 to resolve it, if they are going to call these witnesses  
21 live, which they always intended to do and always  
22 intended to present them live, and we have always  
23 intended to present them live, then they come once, they  
24 are presented in our case and presented live.

25 They have agreed to come here and can come

1 here at the Court's discretion as far as how the Court  
2 wants to set the schedule.

3 MR. STAR: Your Honor, we don't agree. We  
4 think these witnesses, Mr. Mehnert-Meland and Mr. Krause  
5 will be here to testify live. We think we should put  
6 them up in our case, and if there are questions that go  
7 outside the scope of our case, it should be done in  
8 reasonable bounds. It has been known where these  
9 gentlemen are, what their status is as former employees,  
10 and to throw this at us the last moment is actually not  
11 fair.

12 MR. MILLER: And if we are going to get down  
13 to other practical ways, you can subpoena them and take  
14 their deposition. I don't think it is necessary as part  
15 of their case, and they are really more important for us,  
16 which is why I am calling them.

17 MS. LAURDE: Your Honor, a couple of points:

18 I think first both of these gentlemen have  
19 authored very damaging e-mails for SAP. There are a lot  
20 of internal e-mails with these gentlemen involved,  
21 implicating SAP. They are extremely important for our  
22 case in chief. They have been identified on our witness  
23 list from the get-go. We included them on our witness  
24 list.

25 I mean, I have never been in a situation

1 where I had to call up opposing counsel and say "did you  
2 read my witness list?"

3 THE COURT: But is this the first time you  
4 wondered how you would get them here?

5 MR. STAR: We believed they were going to be  
6 available to us.

7 THE COURT: Well, they aren't available to  
8 you.

9 MR. MILLER: Your Honor, with all due  
10 respect, that doesn't make sense. There is their case  
11 and our case, and we have made it clear they have been  
12 part of our case.

13 THE COURT: That doesn't mean they can't  
14 call them.

15 MR. MILLER: No, but it doesn't make sense  
16 out-of-state witnesses would hang around for however long  
17 it is handy for them.

18 THE COURT: No. I think you need to do  
19 something about it.

20 MS. LAURDE: I suppose our option then would  
21 be to arrange for a similar video feed for them if we  
22 want to put them on at that point or —

23 MR. LAMBERT: Or we will need to submit —  
24 indeed, I have submitted prepared designations, although,  
25 your Honor, I would like to review the transcript from

1 the last final pretrial to see what was said on the  
2 record about this, but we can submit their videotape  
3 testimony.

4 THE COURT: That sounds like —

5 MR. LAMBERT: I don't see why there is a  
6 reason, and I am certain I can find e-mail traffic  
7 reflecting this, but the entire reason why deposition  
8 transcript references for Mr. Mehnert-Meland and Krause  
9 were not submitted to this Court to be ruled upon because  
10 we were told they would be available to testify live at  
11 trial, and so we would need, if we want to play their  
12 videos, I suppose we need to go through that process  
13 now.

14 MS. LAURDE: Or do it by video.

15 MR. CARNEY: Or we can cross-examine them in  
16 Defendant's case and go outside the direct examination as  
17 counsel represented that we could.

18 THE COURT: I think maybe that's the better  
19 way to go. You know, juries get tired of watching  
20 video. They like to see a real trial. I mean, for  
21 them, it means a lot. I think that's the way you need to  
22 go.

23 MS. LAURDE: We will resolve it. I think  
24 the options we have available to us, including as  
25 represented by counsel, may be the approach we land on.

1 THE COURT: Okay.

2 MR. CARNEY: Thank you, your Honor.

3 THE COURT: Let's keep going.

4 MR. STAR: I know we have fifteen witnesses  
5 now. It was mentioned Mr. VanLeuwen would be by  
6 videotape. I take it that would mean his video  
7 deposition would be played. I wanted to get that  
8 confirmed. This is a critical witness. He has been a  
9 gentleman up in the air whether he would come.

10 The last Mr. Lambert and I discussed sounded  
11 like Mr. VanLeuwen was coming live, and I wanted to make  
12 sure we had that live so we didn't waste our time  
13 preparing for somebody who wouldn't be here.

14 MR. LAMBERT: He will be by videotape  
15 deposition, and the Court ruled on the designations.

16 THE COURT: Okay.

17 MR. STAR: So all right. Fine.

18 THE COURT: So you know, you have to do  
19 something.

20 MR. STAR: Terrific. Your Honor has ruled  
21 on designations put in front of you. Since Mr. VanLeuwen  
22 will not be here live, there are additional discreet  
23 pieces of his deposition we would like to put before you.  
24 We can confer with opposing counsel beforehand. It is  
25 limited, not objectionable, supplements what's coming in

1 and something the jury should actually hear about. So we  
2 will share that with counsel, and then we will put it in  
3 front of your Honor if that's okay.

4 THE COURT: That's a good thing. So let's  
5 keep going.

6 MR. LAMBERT: Dr. Kennedy is the damages  
7 expert your Honor excluded pursuant to a motion in limine  
8 last year. Obviously, we need to proffer his testimony  
9 to the Court in order to preserve that issue for the  
10 appellate record.

11 The question we had for your Honor was when  
12 would you like that to occur. What we had planned on  
13 doing is bringing him in last, but if the Court would  
14 prefer us to do it at a different time, we would like to  
15 know that so we can schedule his travel.

16 THE COURT: Where is he from?

17 MR. LAMBERT: He is in Boston.

18 THE COURT: Well, we should do it sometime  
19 around when all of us are here anyway, right?

20 MS. LAURDE: Yes.

21 MR. LAMBERT: Yes. We would prefer —  
22 again, our preference is to bring him in after the close  
23 of our last fact witness and put him on and proffer his  
24 testimony, his expert testimony on damages last, and then  
25 unless your Honor has a different point of view, that's

1 what we intend to do.

2 THE COURT: That's a good way to do it.

3 MR. STAR: If I may, this did come up back  
4 in October and consulted the rules. My understanding of  
5 whether a proffer is necessary is simply if it was not  
6 clear in the record what the individual's testimony was  
7 going to be.

8 We think it was clear, and without being  
9 presumptuous and we thought the Court was clear and  
10 that's why we didn't have a Daubert hearing, it is part  
11 of the briefing in your ruling. We had a lengthy  
12 affidavit that was submitted by Mr. Kennedy also in the  
13 record, and we had his deposition, which also was put in  
14 as part of the record because it was submitted as an  
15 exhibit to the briefing on the motion in limine.

16 So our point of view is, we don't think a  
17 proffer is necessary. It is kind of a waste of  
18 everybody's time. If there are things that counsel can  
19 point to — and doesn't have to be now — but in addition  
20 to what's already put in, then maybe it is necessary. If  
21 it turns out to be necessary, even to some limited  
22 extent, we would suggest it happen at a point at the end  
23 when we are done and not distracted by this because we  
24 don't think it is necessary.

25 MR. CARNEY: That's all fine and good, and I

1 understand why he would want it done that way, but the  
2 motion to exclude Mr. Kennedy is a preliminary ruling,  
3 and once you hear our evidence, your Honor, and in  
4 particular the testimony of Mr. Reidl, Otto Reidl, we  
5 anticipate asking you to reconsider that preliminary  
6 ruling, and we may — and you may agree with us at that  
7 time, and we would like to have the opportunity to put  
8 him on at the end of our case. A motion in limine is  
9 preliminary.

10 MS. LAURDE: And were, your Honor, just to  
11 buttress what my partner has stated, the deposition that  
12 was taken by Mr. Star, the way the testimony would come  
13 in would be very different in the flow and the context  
14 and the explanation as compared to the examination  
15 performed during the deposition.

16 It is simply a different means of getting  
17 the information, making it more understandable, and we  
18 believe that once you hear that, that you will, in fact,  
19 reconsider your preliminary ruling.

20 MR. MILLER: Your Honor, if I may, I think  
21 everything we need to know was in that last phrase, they  
22 are hoping that your Honor will reconsider. It is  
23 effectively a motion for reconsideration. There was  
24 Mr. Kennedy's report, his affidavit, and have his  
25 testimony. If it becomes clear during the trial, your

1 Honor's ruling should be revisited, then opposing counsel  
2 will raise it.

3 In October when we thought the case would  
4 take less than two weeks and now hearing two weeks for  
5 just their witnesses and at the end something that is  
6 nothing more than an attempt to have your Honor  
7 reconsider a motion that has already been dealt with I  
8 don't think is necessary.

9 MS. LAURDE: That's a mischaracterization of  
10 what I stated.

11 Frankly, to preserve the issue for appeal,  
12 we have to proffer the testimony despite very fine  
13 lawyers, despite their review of the rules, I am not  
14 going to commit malpractice by not proffering his  
15 testimony. We would like it to occur at the end of our  
16 case.

17 The two weeks that I stated at the beginning  
18 included Mr. Kennedy's testimony. So frankly, I think we  
19 are entitled to have that proffer occur at that point.  
20 It fits. It flows well, but we need to have the proffer  
21 occur.

22 THE COURT: I think we can have the proffer  
23 occur. I think it is appropriate.

24 MR. CARNEY: Thank you, your Honor.

25 THE COURT: You are welcome. Anything

1 further?

2 MS. LAURDE: Your Honor, I think there are  
3 some logistical issues that we may need some guidance  
4 from you on. One is with regard to voir dire. I don't  
5 know what your practice is with regard to that, if you  
6 simply conduct the voir dire yourself or if we also do  
7 that as well.

8 THE COURT: Well, it really depends on what  
9 lawyers want to do. I think if one of you does it, then  
10 I think both sides need to do it.

11 MS. LAURDE: Okay. I think we would like to  
12 if that's acceptable. I am not certain what opposing  
13 counsel says.

14 MR. STAR: I missed what your preference  
15 was.

16 MS. LAURDE: We would like to conduct voir  
17 dire.

18 MR. MILLER: Of course. Fine. So would  
19 we.

20 MS. LAURDE: And my partner, Mr. Lambert,  
21 wants to explain some issues with deposition exhibit  
22 numbering so there is no confusion during the time of  
23 trial.

24 MR. LAMBERT: I wanted to be clear to the  
25 Court there was confusion back and forth between both

1 sides the way exhibits would be marked, and there had  
2 been an agreement, and then we learned maybe that  
3 agreement couldn't hold. So the way that our — the  
4 Plaintiff's exhibits have been marked is according to  
5 deposition number. If they were marked in a deposition,  
6 since Plaintiff uses numbers anyway, we just retained the  
7 number given at the deposition just so there wasn't three  
8 or four different numbers on these depositions when we  
9 submitted them marked.

10 THE COURT: Is that what you are doing, too?  
11 It is important that we get it settled today.

12 MR. STAR: Yes.

13 MR. LAMBERT: I don't think there is any  
14 disagreement between us. I just wanted to make it clear  
15 to the Court so when you see our exhibit list, there is  
16 not a Plaintiff's Exhibit 1, for example, because  
17 Deposition Exhibit 1 isn't one that we plan to use. So I  
18 think our exhibit list starts with 3 and jumps around a  
19 little bit rather than going sequentially 1, 2, 3, 4.

20 THE COURT: You will have to explain that to  
21 the jurors. The jurors want to know what happened to 2,  
22 where is 1?

23 MR. MILLER: We understand that, your Honor.  
24 We have agreement, there is going to be a lot for this  
25 jury to digest, and I think we are in complete agreement

1 it is preferable to continue to use the deposition  
2 numbering that we had been using starting from scratch  
3 and will have to explain the gaps.

4 THE COURT: And on exhibits, you know, we  
5 need lots of copies.

6 MR. STAR: So your Honor is clear, this is  
7 something we did work out and do see eye to eye, and when  
8 we got to the point of submitting the exhibit with the  
9 proper labeling, we were told we need proper numbering.  
10 So we have letters, but we have the actual original dep  
11 numbers, so counsel for both sides understands.

12 THE COURT: Good.

13 MR. MILLER: And to be perfectly clear on  
14 it, I think in terms of researching exhibits during the  
15 trial and handing exhibits to the jury and to the Judge,  
16 the numbering that we would use would be the deposition  
17 numbering because it is what everyone is familiar with  
18 and would be consistent with what would result in the  
19 least confusion.

20 MR. LAMBERT: In the Court's ruling on the  
21 admissibility of exhibits, the Court, when they sustained  
22 objections to Plaintiff exhibits referred to — and this  
23 is my fault — when we filed the original exhibit list,  
24 we did, indeed, get it in new numbers, and this is before  
25 Mr. Star agreed to the new numbering process.

1                   So our original list was 1, 2, 3, 4, 5, 6,  
2                   and 7, and when the Court ruled and sustained objections,  
3                   the Court was referring to that numbering process. We  
4                   worked it out because I was able to cross reference it,  
5                   and we are happy to abide by the Court —

6                   MR. MILLER: And we did the same, did some  
7                   cross referencing, so we know with respect to your  
8                   Honor's rulings precisely which deposition exhibits will  
9                   be excluded.

10                  THE COURT: That's good. That's good you  
11                  are working on that because that's the only way it will  
12                  work. If we have ten jurors, we need ten copies of  
13                  things.

14                  MR. STAR: Is ten jurors, is that the  
15                  number?

16                  THE COURT: I don't know. We can. We can  
17                  have ten jurors.

18                  MS. LAURDE: Would it be helpful, your  
19                  Honor, for us to give you that cross reference for your  
20                  use as to the accuracy of the exhibit numbers admitted or  
21                  not based on how we marked the exhibits?

22                  THE COURT: However it is going to be when  
23                  we are doing the trial is what I need to know.

24                  MR. LAMBERT: We can prepare a chart so that  
25                  we are all clear as to what's been excluded and what's

1 not because when you say Exhibit 1 has been excluded  
2 right now, there is no Exhibit 1, so that should be  
3 easy.

4 THE COURT: The joint statement of the case,  
5 are we going to have a joint statement of the case from  
6 the two of you?

7 MR. LAMBERT: We submitted that in October.

8 THE COURT: We have that. Sorry.

9 MR. STAR: I believe — I think it was part  
10 of a larger document we put in as a joint statement. The  
11 joint statement itself was fairly brief.

12 THE COURT: Should be. We are going to need  
13 final witness lists from each side and detail who is  
14 going to come in live and some come in some other form.  
15 If it is videotape, you need to work with my staff to  
16 make sure all the equipment is here.

17 We have all the equipment, and sometimes it  
18 is in another building, and we have to get it and bring  
19 it over.

20 MR. LAMBERT: We can file ours today, your  
21 Honor.

22 MR. CARNEY: And certainly, our list is  
23 reduced by four since they are going to be called in  
24 Defendant's case. And those individuals, so it is clear  
25 on the record — excuse me — I guess it is only two

1 witnesses?

2 MR. LAMBERT: Is that correct?

3 MR. CARNEY: Mehnert-Meland and Krause will  
4 be called in our case.

5 MS. LAURDE: You have it in reverse.

6 MR. CARNEY: I apologize.

7 THE COURT: I have Mr. Mehnert.

8 MS. LAURDE: Mr. Mehnert-Meland and  
9 Mr. Krause. We will examine them in the Defendant's  
10 case.

11 MR. LAMBERT: And my understanding Mr. DeBoe  
12 and VanLeuwen will be available in our case.

13 MR. STAR: And they are out of towners, so  
14 we need to know when you will need them available.

15 THE COURT: Okay. Somebody asked me because  
16 there are other cases we have, how long is this case  
17 going to be? How long is your presentation going to  
18 take, how many days, do you know? It doesn't have to be  
19 exact.

20 MR. MILLER: Can you give us a sense of what  
21 hours you would like to keep?

22 THE COURT: It says the jury sits from 9:00  
23 to 4:00, 9:00 to 4:00, and the courtroom opens to the  
24 parties at 8:00, 8:15 in the morning.

25 MS. LAURDE: Your Honor, I believe we will

1 require — I believe it will take two weeks for our case.  
2 I mean, I am assuming we will have the first day would be  
3 jury selection, we would have openings, and perhaps start  
4 the first witness on the second day and proceed from  
5 there, but I think for us it will take for the witnesses  
6 alone probably eight full days.

7 THE COURT: How about you, what is you  
8 thinking? It is important to do this simply because  
9 there are bunches of other trials that we have here.

10 MR. STAR: Our expectation would be our case  
11 would be less than a week.

12 THE COURT: Okay. So a three-week trial.  
13 Is that right? I mean not talking about the jury and how  
14 long they take.

15 MS. LAURDE: Right. I think that's correct,  
16 your Honor.

17 MR. MILLER: Just to be clear, your Honor,  
18 obviously no one can predict what's actually going to  
19 happen.

20 THE COURT: That's true.

21 MR. MILLER: And I hope and expect the  
22 Plaintiff's case will go quicker, and it is likewise  
23 possible our case could take longer.

24 THE COURT: That's always true, but it helps  
25 if we know.

1 MR. CARNEY: Yeah. And a lot of it is  
2 based on, we don't know how long your cross-examinations  
3 of our witnesses will be and — I mean, that's always an  
4 issue.

5 THE COURT: I am trying to figure this out,  
6 and I don't want it to be in the middle of your trial,  
7 but we can make it. Okay. So maybe a four-week trial  
8 at the most. I know the jury can take a long time,  
9 too.

10 MS. LAURDE: I think that's correct, your  
11 Honor.

12 Your Honor, again, this is sort of a  
13 logistical question: Some of our exhibits are pretty  
14 voluminous, and I know that we are required to produce a  
15 binder set for each juror. Does it make sense to just  
16 have some of those copies available or have them  
17 available on disk or in some other way because some of  
18 them are fairly lengthy, and I am just not certain how  
19 you have dealt with that in the past with regards to  
20 large exhibits.

21 THE COURT: We really leave it up to you.  
22 You have to think carefully how much a juror is going to  
23 deal with them, what they need, and the fact that they  
24 also have another life outside of the courthouse. So you  
25 don't want to overwhelm the them. So I can't really help

1 you much with that. We will stack up the binders, and to  
2 the extent you are using other equipment, we will make it  
3 available to them.

4 We do allow our jurors to take notes, and  
5 they take good notes. Some of them draw a lot of  
6 pictures. The daily schedule, did I go over that, 9:00  
7 to 4:00, one our for lunch? We have witness rooms on  
8 this floor and have a lot of space, and you are able to  
9 use some of those witness rooms, so they become  
10 accessible at 9:30 in the morning — no, 7:30 in the  
11 morning.

12 MR. MILLER: Are there more than one of  
13 them, your Honor?

14 THE COURT: Yes. We have a bunch of rooms  
15 and can give each of you one room.

16 MR. MILLER: And we can keep stuff in  
17 there?

18 THE COURT: Yes. Well —

19 MR. MILLER: Paper?

20 THE COURT: Can they leave stuff? They said  
21 no, because the concern is no one can tell you whether it  
22 will be there when you come back.

23 LAW CLERK: I don't believe we have keys  
24 to those rooms, so they may not be secure, not that  
25 people are raiding the federal courthouse for lots of

1 documents.

2 THE COURT: But there are lots of other  
3 things that go on that have nothing to do with the  
4 courts. So we really can't keep things locked up for  
5 you. It is tough. That's the way it is. We can show  
6 you witness rooms before you leave today. No cellphones  
7 in here. They have to be turned off anyway. The  
8 cellphones have to be turned off when you are in the  
9 courtroom.

10 We ask on voir dire, we ask prospective  
11 jurors standard questions, and we also permit case  
12 specific questions if you want to provide them to me.  
13 Sometimes lawyers ask follow-up questions. It just  
14 depends on how it is all going.

15 MR. STAR: Your Honor, I think we did both  
16 provide voir dire questions.

17 THE COURT: Yeah. And, you know,  
18 prospective jurors can be stricken for cause. And we use  
19 what we call the informed strike method of actually  
20 deciding peremptories.

21 MR. MILLER: Can you explain so we are  
22 clear?

23 THE COURT: We have three peremptory  
24 strikes, and you each get three, and they take three,  
25 yeah. So issues arise all the time in trials, and we try

1 to do most of them at the end of the day or when we have  
2 a break, and we do have breaks during the day. But when  
3 there is an issue arising, it is important that you do it  
4 in the kind of way — you are all seasoned lawyers, and  
5 you don't want to disrupt the jury or make them think you  
6 are doing secret things on the side. We don't do bench  
7 conferences at all when the jury is in the box, and we  
8 allow our jurors to take notes.

9 This is a rule that you need to know about.  
10 The parties and lead counsel of record should be advised  
11 that the Court, pursuant to one of our rules so we have  
12 to follow it, will assess parties or counsel with the  
13 cost of one day's attendance of jurors if the case is  
14 settled after the jury has been summoned. The deadline  
15 for calling off the jury is 6:00 p.m. on the evening  
16 before trial. So if you settle your case at 6:15, you  
17 are in trouble.

18 Opening statements, you are fine. One of  
19 the most common complaints the jurors give judges is that  
20 lawyers ramble on and on in opening statement. People  
21 who come down here, leaving all their work and are  
22 sitting in that box, want to get the jury trial going.

23 So I am just telling you that, that they  
24 will be happy to listen, but that's one of the complaints  
25 we get, is that it just goes on and on. The lawyer just

1 talked and talked. We want the trial to start.

2 MR. STAR: Does your Honor want to put a  
3 limit on that? We would be okay with that.

4 THE COURT: No. You are all good lawyers.

5 We can't store anything in the courtroom.  
6 You need to keep your home and cellphone numbers  
7 available, and we will give you some numbers to call in  
8 case something comes up, and we have to notify you  
9 quickly.

10 MR. MILLER: As long as we can give you our  
11 hotel numbers because if the bell rings at my house and  
12 one of my kids pick it up —

13 THE COURT: It has happened. Yeah, we have  
14 had to chase people down.

15 It is late to talk about settlement, but it  
16 is always an option, and I want to remind you of that,  
17 that it is always an option, and sometimes it happens  
18 that just after we have gone through all kinds of things  
19 and impaneled a jury, suddenly something happens, a fact  
20 out there, and you can settle the case. And if you want  
21 to do it, doing worry about it just because we have  
22 impaneled a jury or did other things because it stays an  
23 option.

24 If you reach a settlement after 6:00 p.m. on  
25 Sunday, you are going to be assessed the cost of one

1 day's attendance of the jury. So this is not a very  
2 complicated case. It is an interesting case, and it  
3 matters a lot to the people in it, and you haven't been  
4 able to settle it.

5 You are a very good group of lawyers, and I  
6 am still hopeful somewhere along the way you might be  
7 able to, but I know once you get geared up to go to trial  
8 it is hard, but you can do it even during the  
9 presentation of the case. Just always keep it in the  
10 back of your minds.

11 MR. STAR: Your Honor, I have — I'm sorry.

12 THE COURT: No. I am waiting for questions.

13 MR. STAR: Just a couple of other  
14 housekeeping items. The schedule we have heard about  
15 gives us a potential problem with our liability expert,  
16 Mr. Hilliard. He is actually with his wife scheduled to  
17 go in the middle of the first week in March to Haiti for  
18 a relief effort. I need to find out when he can come  
19 back and could discuss his testimony.

20 THE COURT: Well, do you understand when  
21 he'll be back?

22 MR. MILLER: When we thought the trial would  
23 be two weeks or less, our point was we wanted to fit him  
24 in before he left on the 5th.

25 THE COURT: Right.

1                   MR. MILLER: We never figured out when he  
2 was planning on returning, and it might be able we can  
3 fit him in after he returns. If that's not possible, we  
4 may have to take a break and wait for Hilliard to return.  
5 He leaves on the 5th.

6                   THE COURT: I have to be in Europe at a  
7 certain time, so I am going to get that date for you,  
8 too. If we start squeezing it toward a later date, I am  
9 going to run into that, but I can't remember the exact  
10 day.

11                  MR. STAR: Would you like me to wait for the  
12 law clerk to come back?

13                  THE COURT: It doesn't matter.

14                  MR. STAR: A couple of document issues.  
15 There are — and I am going to talk with counsel — but I  
16 wanted to make your Honor aware, and we can submit these,  
17 there are some key conversations that are alleged to have  
18 happened back in 2003 between Mr. Reidl and Mr. Antonio,  
19 and as far as the document production that goes back  
20 years ago, we have handwritten notes from both  
21 individuals from those particular meetings.

22                  Neither party actually put them in as  
23 exhibits, and we think they ought to come in. They are  
24 the notes these people took from those conversations.  
25 The jury is going to hear about those conversations.

1 I will talk with opposing counsel whether  
2 they have objection to any of them, and then we can  
3 deal with that, but I think they are probably  
4 unobjectionable.

5 THE COURT: Okay.

6 MS. LAURDE: Your Honor, until we see them  
7 certainly, but you know, obviously, the deadline for  
8 identifying any of these documents has long since passed.  
9 But we will take a look at those notes.

10 THE COURT: Okay.

11 MR. STAR: Another issue, your Honor,  
12 involved documents, e-mails specifically that were  
13 generated between Hodell and subsequent ERP providers  
14 currently called Activan, a program called Product 21.  
15 As it turned out, this issue in these particular  
16 documents were part of a motion in limine that Hodell had  
17 filed, and we responded to it and your Honor denied that  
18 motion in limine.

19 Then, in the course in doing the exhibit  
20 lists, we, of course, listed these exhibits. That was  
21 the genesis of their motion in limine, and they put in  
22 their objections, and we put in our response. What we  
23 didn't put in our response was that this was subject to a  
24 pending motion in limine, which by the time your Honor  
25 ruled on the actual exhibit objections, you had already

1 denied their motion in limine.

2 I wanted to get clarification because it  
3 seemed inconsistent, and these documents are very  
4 important to our case. They go to a variety of  
5 substantive issues, mostly causation with respect  
6 specifically to the damages theory that we think Hodell  
7 is coming forward with, and I can identify those  
8 particular documents.

9 They were deposition exhibits 325, 326, 327,  
10 then also Exhibit 275, 277, those were the main five we  
11 really were concerned about and Hodell's motion dealt  
12 with — pardon me — also dealt with — let me just read  
13 them again, pardon me: Exhibits 273, 274, 275, 276, 277,  
14 278, 279, 280 and 325, 326, and 327.

15 MR. MILLER: Just to be clear, the ones that  
16 Mr. Star listed, the five was the five that we would like  
17 to introduce notwithstanding your Honor's ruling on the  
18 exhibits, so we can proceed consistent with your Honor's  
19 ruling of the motion in limine motion. What Mr. Star was  
20 reading from was the entire list that set forth in the  
21 motion in limine.

22 MR. STAR: Let me get that again because we  
23 got a little confused there.

24 MR. LAMBERT: I am confused.

25 THE COURT: Yeah.

1 MR. STAR: So Hodell filed a motion in  
2 limine based on those exhibits that I just rattled off.  
3 They deal with Hodell's subsequent implementation of  
4 software through a company called Activan for a program  
5 called Product 21. Your Honor denied their motion in  
6 limine, and all of those exhibits were ruled upon on the  
7 exhibit list separately. And after the denial of the  
8 motion in limine and your Honor struck all the exhibits  
9 when ruling on the exhibit list, and the most important  
10 of those exhibits in our view are 325, 326, 327, 275, and  
11 277.

12 So we wanted to just get clarification as to  
13 whether — as to what actually is the status of these  
14 documents and go from there.

15 THE COURT: I would have to go back from  
16 there, and I can't off the top of my head, but I did  
17 write down the numbers. I have the numbers you gave  
18 me.

19 MR. LAMBERT: I don't have the Court's  
20 ruling in front of me. If those were stricken, then our  
21 position is that they were — if the objection to those  
22 documents were sustained, then my understanding is those  
23 documents would not come in. The reason that we objected  
24 to them and separate and apart from the motion in limine,  
25 but they are just simply not relevant to the case.

1           And I believe that's why the Court excluded  
2           them. They also excluded the testimony — the Court also  
3           excluded the testimony of Mr. Sheldon on this same topic.  
4           It concerns the implementation of a completely different  
5           piece of software after the failure of the software that  
6           we are here about today.

7           And if we are going to get into the  
8           particulars of that, then we will be trying two cases  
9           because then we have to start doing a trial within a  
10          trial without subsequent implementation that it is part  
11          of this lawsuit, frankly. So that's why those documents  
12          are objected to and more than likely why the Court  
13          sustained those objections.

14          MR. STAR: So all of what Mr. Lambert just  
15          said was exactly what Hodell argued in its motion in  
16          limine at the time. The issue is not that we want to go  
17          into exploring subsequent ERPs implementation. We do not  
18          intend to do that.

19          The issue of these documents goes directly  
20          to the element whether, the issue of whether — Hodell is  
21          right when it says that SAP caused it harm and whether as  
22          Hodell says SAP caused Hodell to have major productivity  
23          losses.

24          One of the documents, your Honor, Exhibit  
25          325, is an e-mail from Kevin Reidl, Hodell's president,

1 to Activan, a subsequent provider, and he tells them our  
2 business is off — this is September 2009 — our business  
3 is off 25 percent, but our headcount is up since we went  
4 live on Product 21. Any efficiency we had has vanished  
5 with the implementation of this software.

6 It goes on, and there are other documents  
7 that go to the same issue. Kevin Reidl, again, December  
8 19, 2009, so a few months after this, he tells Product 21  
9 and Activan, we are now at historical low levels of  
10 productivity since going live with this software on April  
11 1st, 2009.

12 So all the documents speak to this issue,  
13 and they are very important to us as part of our case,  
14 and there are documents that we want to be able to  
15 discuss and a topic we want to talk about in our opening,  
16 and this really was dealt with when your Honor ruled on  
17 the motion in limine and denied it.

18 THE COURT: I think so.

19 MR. LAMBERT: All this is going to do is  
20 confuse the jury. This is not a separate software  
21 implementation. Even if the jury were to accept SAP's  
22 portrayal of those e-mails, it doesn't have any ability  
23 to prove or disprove whether SAP's software also caused  
24 productivity loss, which is admitted throughout SAP's  
25 e-mails.

1                   So all SAP is proving is that another  
2 software may have also contributed to productivity losses  
3 outside the damage period, outside the period we are  
4 claiming productivity losses for. So it is simply not  
5 relevant to the case.

6                   MR. CARNEY: And that's why you excluded  
7 them.

8                   MR. MILLER: Your Honor, if I may, I won't  
9 respond to the last comment, but I will say when the  
10 objection was made to the exhibits, it was not confirmed  
11 with your Honor that you had already denied the motion in  
12 limine, which may have avoided all of this confusion in  
13 the first place.

14                  But going to the issue that Mr. Lambert  
15 addressed, one of the points that we will be making in  
16 this case is that business — there is a causation issue  
17 fundamentally here, and one of the issues we will be  
18 making in the case, notwithstanding all of the protests  
19 of the Plaintiff, the business worked and worked for two  
20 years, and they could test that.

21                  And it will be relevant to show that when  
22 they switched off what we say worked, things got much  
23 worse because what they had before was actually pretty  
24 good, and they can argue all they want, but that's  
25 relevant and material evidence. And it relates to other

1 points that will come up shortly having to do with  
2 causation, because our fundamental point was the Business  
3 One worked, but even if it didn't, the problems that you  
4 did experience when you say you had to limp along for  
5 those two years were caused by the add-on, radio beacon,  
6 the add-on, the mistakes they made in testing the system,  
7 and the mistakes they made when they did go live because  
8 they didn't run a parallel system.

9 So all of this is relevant to all the facts  
10 and circumstances regarding the fundamental inquiry. The  
11 Business One worked like we say, and if it didn't, what  
12 was the problem? Or if Business One wasn't perfect, is  
13 that what was fundamentally causing the problem?

14 THE COURT: You need to save these remarks  
15 for the jury. So I think you know pretty much where we  
16 are and when we are going to start up and how long we  
17 will go. How long can we go? We have a six-week window,  
18 no problem.

19 MS. LAURDE: We certainly —

20 THE COURT: You couldn't keep a jury for six  
21 weeks. Okay. All right. We will look forward to having  
22 you all in front of us. You are familiar with the place.  
23 We will give you — my clerk can take you around and show  
24 you the various spaces. You know, there is a wonderful  
25 jury room back there for our jurors, and we will look

1 forward to this trial. It is an interesting case. It is  
2 too bad it couldn't get resolved. I really thought maybe  
3 you would be able to find a resolution.

4 You know better than I do what was the  
5 reason why you couldn't have a resolution, but whatever  
6 it was, we will go forward and get the trial, and all  
7 these folks will come in from the farms and the cities in  
8 Northern Ohio, and to the extent you can maintain their  
9 attention, you are all good lawyers, I think you will, we  
10 will see what they decide.

11 MR. STAR: Before we close for the day, your  
12 Honor, if you would like to speak with the parties  
13 separately about the settlement issues, we would be more  
14 than happy to do that.

15 THE COURT: It would be an important thing  
16 to do. I don't want to — I have the time. I will make  
17 the time to work with you.

18 MR. STAR: We as well.

19 THE COURT: So I think it would be a good  
20 idea. What I would suggest is my clerk will show you  
21 some spaces that are good to work in. We resolve an  
22 awful lot of cases and for good reason that they should  
23 be resolved, but sometimes you can't do it until  
24 everybody has had a chance to look at everything in the  
25 case. But you have got a lot of sensible people here.

1 You have done a very good job of presenting the sides of  
2 the case to me. I like it.

3 I think you are doing good job, and I think  
4 you would have an interesting time with the jury, but  
5 remember the jury you will get is in the top half of  
6 Ohio. The lawyers need to think about that hard because  
7 this is not the kind of case that is going to fascinate  
8 people. It is very important to those sitting in the  
9 room, but if you can work something out today, I will  
10 stay here and help you. But first, you need to decide  
11 whether you are really ready to do that.

12 You have certainly given me enough  
13 information for the trial to go forward. Okay? All  
14 right. So you will find a good place for them to work.  
15 You may want to talk with each other before you talk to  
16 us. Talk to your own folks about it.

17 (Adjourned at 12:02 p.m., and further  
18 discussion was held off the record.)

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C E R T I F I C A T E

I, George J. Staiduhar, Official Court  
Reporter in and for the United States District Court,  
for the Northern District of Ohio, Eastern Division,  
do hereby certify that the foregoing is a true  
and correct transcript of the proceedings herein.

s/George J. Staiduhar  
George J. Staiduhar,  
Official Court Reporter

U.S. District Court  
801 W. Superior Ave., Suite 7-184  
Cleveland, Ohio 44113  
(216) 357-7128